

No. 1-12-0255

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREGORY COLLINS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY;)	
DIRECTOR OF ILLINOIS DEPARTMENT OF)	
EMPLOYMENT SECURITY; and BOARD OF REVIEW,)	
)	No. 11 L 51025
Defendants-Appellants.)	
)	
and)	
)	
BROWN LIQUORS, INC. c/o PERSONNEL PLANNERS)	
DAVID PROSNITZ,)	Honorable
)	Robert L. Cepero,
Defendant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff's refusal to work as scheduled constituted misconduct in connection with his work and disqualified him from unemployment benefits, the circuit court's judgment was reversed.

¶ 2 The Board of Review of the Illinois Department of Employment Security (Board) found plaintiff, Gregory Collins, ineligible to receive unemployment benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). The circuit court reversed the Board's decision. On appeal, defendants (the Board and the Illinois Department of Employment Security (Department)) contend that the Board's finding that Collins was discharged for misconduct was neither against the manifest weight of the evidence nor clearly erroneous. We agree with defendants and uphold the Board's decision.

¶ 3 Although Collins has not filed a brief, we will proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 The record shows that Collins worked as a sales clerk at Brown Liquors, Inc. (Brown) from July 6, 2009 until May 7, 2011, earning \$9.05 per hour. Included in the record is the employer's policies concerning employee rules and conduct, which state, in pertinent part, that it is a policy violation to fight or interfere with employees, customers, supervisors, or other individuals at any time, use obscene language, engage in insubordination, and fail or refuse to accept a new job assignment or a change of employment to a new location, section, or shift.

¶ 5 Collins received two written warnings prior to his discharge for violating company policy. On October 8, 2010, Collins received a written warning reflecting a one-day suspension imposed on October 6, 2010, because he refused the instruction of store manager Patricia Harold to wear his company jacket while working. The written warning informed Collins that he could be terminated if the problem recurred. On November 11, 2010, Harold again issued Collins a written warning for misconduct. The warning stated that on November 6, 2010, Collins acted unprofessionally when he approached Harold to discuss his schedule. The warning indicated that the store manager could suspend Collins for further transgressions. Collins responded that he believed Harold acted unprofessionally when she removed him from the work schedule for

Sunday, November 14, 2010, "simply because [he] asked her if [he] could get a Sunday off."

Both warnings were signed by Collins. The record also shows that Collins was discharged on May 7, 2011, for allegedly failing to work his shift and perform inventory as scheduled.

¶ 6 Following his discharge, Collins applied for unemployment benefits with the Department, and the employer objected claiming that Collins was discharged for misconduct under the Act. On May 31, 2011, a claims adjudicator agreed with the Department, finding Collins ineligible for benefits because he was discharged for misconduct, *i.e.*, refusing to work his shift and perform duties as assigned.

¶ 7 Collins appealed, and on June 29, 2011, a telephone hearing was conducted by a Department referee. At this hearing, Rick Williams, the general manager and director of personnel at Brown, and Patricia Harold, the store manager at Brown, testified for the employer. Although three pages of the hearing transcript are missing from the record of appeal, the available testimony from Harold shows that she stated Collins refused to work the day of inventory, *i.e.*, May 1, 2011, despite the fact that Harold told him he had to work that day. Collins' refusal to do inventory showed insubordination as such work was mandatory for all employees. Due to Collins' refusal to work, Harold had to change the work schedule and substitute another employee for Collins. After changing the schedule, she told Collins that he did not have to work on May 1. Harold further indicated that Collins had been previously warned at least once for insubordination due to his failure to wear the company jacket.

¶ 8 The available testimony from Williams shows that he stated that Collins received a second violation for being insubordinate in November 2010 when he refused to work during his scheduled time. Williams also testified that Collins refused to work on the day of inventory because he was upset his bonus check was only \$20, and he felt it should have been larger.

Williams explained that employees receive a bonus when the store makes a profit, and Collins' bonus check was only \$20 because he had only worked at the store a short time.

¶ 9 Collins testified that during the time of his employment with Brown he received one written warning for "working a shift, but *** being deprived of sleep," had no recollection of being warned for not wearing the company jacket, and never told Harold that he did not want to work on inventory day because the last time he only made \$20. Collins also testified that he and Harold had a phone conversation on April 30, 2011, regarding him working the following day to take inventory. According to Collins, Harold wanted him to work a shift starting at 8 a.m., despite the fact that he had just worked a shift that ended at 1 a.m. Collins asked Harold if he could start work at about 10 a.m. instead of 8 a.m. because the store did not open until 11 a.m. In response, Harold told Collins that she would take him off of the schedule, which she did. Collins subsequently worked for three more days before being discharged without being provided a reason by the employer.

¶ 10 Harold testified that Collins' testimony that he was taken off of the schedule after he asked her to arrive late to work was false. Instead, Harold indicated that Collins told her he did not want to work on inventory day because he only received \$20 at the last inventory. Harold also stated that she told Collins he was being terminated for insubordination because he failed to work the mandatory inventory day.

¶ 11 Portions of the employer's policy handbook and Collins' written warnings from October and November 2010 were admitted into evidence during the hearing.

¶ 12 In affirming the local office determination that Collins was ineligible for benefits, the referee found that Collins was discharged for misconduct and that he remained disqualified for unemployment benefits. In so finding, the referee stated that Collins was not credible when he testified that he was discharged for merely inquiring about his shift. In contrast, the employer's

eyewitness was credible and detailed that Collins disputed having to work at the final incident, and, in the end, announced that he would not work that day. The referee further indicated that Collins had previously been warned for insubordinate behavior, and that misconduct was proven by the preponderance of the evidence.

¶ 13 Collins appealed the referee's decision to the Board. On September 6, 2011, the Board affirmed the referee's decision, concluding that it was supported by the record and the law, and incorporated it as part of the Board's decision.

¶ 14 On September 15, 2011, Collins filed a complaint for administrative review of the Board's decision in the circuit court. On December 20, 2011, the circuit court reversed the Board's decision. This appeal follows.

¶ 15 We review the final decision of the administrative agency and not the decision of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). The applicable standard of review depends on the issue raised. This court reviews pure questions of law *de novo* (*Village Discount Outlet*, 384 Ill. App. 3d at 525), but the Board's findings of fact are governed by a different standard of review, *i.e.*, they are entitled to great deference and will be affirmed unless they are against the manifest weight of the evidence (*Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)).

¶ 16 The question of whether an employee was disqualified from unemployment benefits for misconduct presents a mixed question of law and fact and is subject to the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency's decision may be deemed clearly erroneous only where the reviewing court is left with the definite and firm conviction that a mistake has been made based on the entire record. *AFM Messenger Service*, 198 Ill. 2d at 395. For the reasons which follow, we find that this is not such a case.

¶ 17 To be ineligible for unemployment benefits under section 602A of the Act, a claimant's cause of discharge must be related to work misconduct, which deliberately and willfully violates a reasonable work rule or policy governing work-related behavior. 820 ILCS 405/602A (West 2010). Further, such violation must harm the employer or other employees, or must be repeated after a warning from the employer. 820 ILCS 405/602A (West 2010).

¶ 18 We initially note that the transcript from the telephone hearing is incomplete as it is missing three pages of testimony, including portions of testimony from Williams and Harold. Any doubts arising from the incompleteness of the record will be resolved against the Board. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)) (stating that an incomplete record is held against the appellant). Nevertheless, we find the record adequate to review the Board's claims.

¶ 19 At the hearing, Harold and Williams essentially testified that Collins refused to work the day of inventory because he only received a \$20 bonus. Due to Collins' refusal to work, Harold had to change the work schedule in order for another employee to be there on the day of inventory. Harold stated that Collins' refusal to work showed insubordination as every employee was supposed to work inventory, and, as a result of his conduct, she discharged him. Both Harold and Williams' testimony established that Collins had been previously warned for insubordination, and their testimony was consistent with the record, which shows that Collins received and signed two prior warnings for misconduct in October and November 2010. Collins testified, however, that he received only one written warning for "working a shift, but *** being deprived of sleep," and was discharged for asking Harold if he could arrive late to work on inventory day.

¶ 20 It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicting testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). Here, after considering the testimony of Harold,

Williams, and Collins during the telephone hearing, the Board incorporated the referee's decision as part of its decision, which found that Collins' testimony was "not credible," and settled this issue in favor of the employer. After reviewing the record, and deferring to the Board's assessment, we cannot say that this conclusion was against the manifest weight of the evidence. *Caterpillar, Inc. v. Doherty*, 299 Ill. App. 3d 338, 344 (1998).

¶ 21 Considering the Board's findings as *prima facie* true and correct (*Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002)), we find that the Board's determination that Collins was ineligible for unemployment benefits was not clearly erroneous (*AFM Messenger Service*, 198 Ill. 2d at 391). Collins knowingly violated a company policy by failing to work as scheduled after being warned on previous occasions for similar insubordinate conduct.

¶ 22 For the foregoing reasons, we reverse the circuit court's judgment and uphold the Board's decision disqualifying Collins from receiving unemployment benefits.

¶ 23 Judgment reversed.